UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #14md2542
KEURING GREEN MOUNTAIN SINGLE-SERVE COFFEE ANTITRUST LITIGATION	:	1:14-md-02542-VSB-HBP
	:	New York, New York May 22, 2019
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PROCEEDINGS BEFORE
THE HONORABLE HENRY B. PITMAN
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording;
Transcript produced by transcription service.

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E X H I B I T S

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THE CLERK: This is in re: Keurig Green Mountain Since-Serve Coffee Antitrust Litigation, docket 14md2542, counsel, your appearances for the record.

MR. ALDO BADINI: Good morning, Your Honor, Aldo Badini on behalf of the Treehouse plaintiffs from the law firm of Winston & Strawn, LLP.

MS. SUSANNAH TORPEY: Good morning, Your Honor, Susannah Torpey of Winston & Strawn on behalf of the Treehouse plaintiffs.

MR. MARIO MOORE: Good morning, Your Honor, Mario Moore of Dan Johnson Law Group on behalf of JBR.

MS. LEAH BRANNON: Hi, Your Honor, Leah Brannon from Clearly Gottlieb on behalf of Keurig.

MS. WENDELYNNE NEWTON: Wendy Newton, Your Honor, from Buchanan Ingersoll & Rooney on behalf of Keurig defendant.

MS. MACKENZIE BAIRD: Mackenzie Baird, Buchanan Ingersoll & Rooney on behalf of Keurig.

THE COURT: Anybody else? No, okay. All right, we are here today, I guess the first issue, there's a letter I got yesterday which we will talk about in a few moments, but the principal issue to be discussed today is the issue raised in defendant's letter of April 17 concerning JBR's assertion of privilege

with respect to certain communications with its attorney. In that regard, I have defendant's letter of April 17, Mr. Johnson's, I think it's -- oh, Mr. Moore's letter, excuse me, Mr. Moore's letter of April 24, and a second letter on behalf of defendant dated April 26.

Let me cut to the chase here and just ask a question of, it's Mr. Moore, right?

MR. MOORE: Yes, Your Honor.

THE COURT: Yes. Mr. Moore, as I understand it, with respect to the arbitration documents, once you get an order from me you're good to turn those over, is that right?

MR. MOORE: Yes, Your Honor, with a couple of caveats. Some of the documents at issue in the arbitration do involve privileged communications between JBR's attorneys, Cobalt and, in particular, Ms. Abramson, from 2013 through 2015. The content of those communications was at issue in that arbitration.

THE COURT: And are those documents relating to JBR's claim that it's, or JBR's use of packaging that described its pods as biodegradable or compostable, or a similar term?

MR. MOORE: Yes, Your Honor, they do relate to those type of claims.

THE COURT: All right. Let me ask you another question, I'm looking at your April 24 letter, page 3, the paragraph that bridges pages 3 and 4, the paragraph beginning "however, in order to avoid an unnecessary dispute," are you agreeing to turn over the documents there that Keurig is seeking?

MR. MOORE: Your Honor, we would turn over the documents there that are not privileged. For example, the opinion in that matter, we could turn that over in redacted form. We could turn over documents in that matter that are not privileged. But what we, I think we first need to address the larger issue --

THE COURT: Hold on a second. I mean you say JBR offered to disclose all communications with Cobalt and Abramson regarding the use of biodegradable, no plastic cup, and compostable. So if I understand what you just said, you are still asserting privilege with respect to some of those documents?

MR. MOORE: Yes, we are now, because they rejected our offer. We offered to do it in the context of 502(D) based on Your Honor's prior order encouraging the parties to enter into 502(D) orders.

THE COURT: All right. Well why don't I hear then from Keurig first, then I'll hear from Mr. Moore.

Okay, go ahead.

MS. BRANNON: Thank you, Your Honor, this is Leah Brannon or Keurig. Keurig is seeking an order compelling the production of two categories of documents from JBR, both arbitration documents that Your Honor just referenced and also the underlying advice. We don't understand JBR to have previously offered to provide all of that advice, even under a 502(D) order, and we believe that a 502(D) order is not appropriate here because JBR has intentionally and selectively disclosed aspects of the advice and we believe that creates a waiver.

Witnesses for JBR have testified affirmatively about the advice they received from their counsel --

THE COURT: Let me just ask you a question at the outset here, your Lanham Act claim, your 43(A) claim, is limited, am I correct in my understanding that it's limited to the representations by JBR on its packaging that its pods are biodegradable, or compostable, or some other similar terms?

MS. BRANNON: It is not limited to claims on JBR's packaging.

THE COURT: What other, what else are you alleging in your 43(A) claim, how else are you

alleging that JBR violated 43(A)?

MS. BRANNON: We are also challenging other advertising claims that they made beyond their packaging including --

THE COURT: What other advertising claims?

MS. BRANNON: They've made advertising claims on their website --

THE COURT: What are the substance of the claims that you're challenging?

MS. BRANNON: They've used different variants, so it's not all the term biodegradable or compostable, they've also called their products earth friendly, greener, no plastic.

THE COURT: No, but does it all relate to the claimed characteristic that the pods will break down and not last for 5 million years in a landfill?

MS. BRANNON: Yes, generally it all related to environmental --

THE COURT: You're not saying they are misrepresenting the calories or they're misrepresenting the sugar content, or they're misrepresenting the size of the cup or anything like that, it all relates to the ability of the cup or the characteristic of the cup to break down over time?

MS. BRANNON: That's correct.

THE COURT: Okay, go ahead.

MS. BRANNON: We have characterized this as green washing claims.

THE COURT: As what?

MS. BRANNON: As green washing, false environmental --

THE COURT: Okay. All right, fair enough, go ahead.

MS. BRANNON: So as to the environmental advertising advise, we do believe that JBR has waived privilege in two independent ways, first by intentional self-serving disclosure of portions of the advice, and second, because of the good faith defense that they've asserted to Keurig's counterclaims.

As far as the intentional disclosures and the intentional waiver, JBR witnesses have intentionally disclosed a portion advice, Jim Rogers, of the Rogers family, and Tom Garber, both of whom are senior JBR executives, repeatedly divulged the substance of conversations with JBR's advertising attorney. Counsel did not object to the questions that elicited these responses or the substance when the witnesses gave this testimony and this is exactly what the Courts in

this district have said creates a subject matter waiver.

So Jim Rogers, for example, testified that upon the advice of our attorney, which turned out to be a disaster, she recommended we change it to biodegradable. No please recall that we used the terms biodegradable only after engaging an environmental attorney who advised us to use that term. Tom Garber testified similarly that the lawyer said we could not use compostable and that we should use biodegradable and I believe we followed her advice.

JBR argues that that's not an intentional waiver of privilege because one could readily discern from its privilege logs that that is the advice the attorney gave, we just don't think that's correct. Privilege logs don't say what your attorney advised you, they say advice from attorney regarding product labeling, they don't say and the attorney told us to advertise the product as biodegradable and not compostable.

THE COURT: And I mean also I guess sometimes clients follow an attorney's advice, sometimes they don't. I mean you can't really tell whether or not, the fact that a party consults an attorney regarding

an issue doesn't tell you whether the client is following the attorney's advice or not.

MS. BRANNON: That's right, Your Honor, I mean we would agree with that. And JBR is arguing that it changed its labeling to begin using the term biodegradable for the first time after consulting the attorney. Again, we don't think that proves the attorney's advice for the reason you noted, but also we don't think that is factually accurate because we've found through discovery evidence of them using that term extensively prior to the time when they say they engaged this attorney.

So we do believe that these were intentional disclosures of a portion of the advice and the disclosures, the undisclosed or withheld communications concern the same subject matter. So the advice that Mr. Moore is saying that they would like to produce only under a 502(D) order and claim that they haven't waived privilege over, is really the same subject matter.

JBR witnesses say they were told to advertise their products as biodegradable but the withheld communications actually don't say that. And we know that, Your Honor, because we reviewed some of the

documents that JBR produced to us before JBR attempted to claim privilege over them. And in light of Your Honor's order dated May 7, we understand that we can use the content of the documents to the extent we became aware of it, before JBR asserted privilege.

THE COURT: Let me ask you a question, I'm looking at JBR's ninth affirmative defense which I think was cited in one of your letters, and the ninth affirmative defense reads as follows: "The complaint in each of the purported causes of action asserted therein against JBR is broad in whole or in part because at all times and places mentioned JBR acted without malice and with a good faith believe in the propriety of its conduct."

If, in support of that defense, defendant, excuse me, JBR was not going to rely on the advice of counsel, would there still be a waiver? I mean if they were going to support that device by saying, you know, one of our staff members took the cup, put it in his compost pile, came back in six months and the cup was gone, the cup had dissolved, in other words, they were relying on a factual basis for the claim, not the advice of counsel, would there still be a waiver?

MS. BRANNON: Yes.

THE COURT: Why?

MS. BRANNON: And, well, two reasons. One is that we believe they separately waived the affirmative testimony, but if you --

THE COURT: Okay, put that aside, put aside the testimony and document production, if their good faith defense was based on factual matters, factual things, not the advice of counsel, would there still be a waiver?

MS. BRANNON: Yes.

THE COURT: Why?

MS. BRANNON: So even setting aside the intentional disclosure --

THE COURT: Right.

MS. BRANNON: The good faith defense calls into question JBR's saying it had a good faith belief and the propriety of its actions. And it's belief and the propriety of its actions goes to its understanding of the law.

THE COURT: The facts, I guess.

MS. BRANNON: Multiple parties in other cases have tried to run this particular argument, that they can assert a good faith defense without pulling in their advice of counsel and the Courts have rejected

that. So the Court in *Bilzerian*, Mr. Bilzerian wanted to testify that he acted in good faith with his disclosures, his securities disclosures, and he said he could do that without getting into the advice from his counsel and just talk about his own knowledge of the law. And the Court said Bilzerian's testimony that he thought his actions were legal would have put his knowledge in the law and the basis of his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge.

The same is true in the *Chipotle Mexican Grill* case that we cited. Chipotle wanted to assert a good faith defense to labor standards violations and they wanted to argue good faith without disclosing advice of counsel. And the Court, again, rejected that. The Court said where the defendant has clearly benefitted from advice of counsel on the various issue on which it asserts good faith, it puts its relevant attorney-client communications at issue and thereby waives its privilege.

So there are multiple other cases that we've cited but when a defendant in a claim asserts a good

faith defense in the propriety of its actions, it is waiving, it has received advice of counsel on that particular issue, it waives its privilege over those communications because that goes to its good faith. If their counsel told them, and we've seen some communications where their counsel told them that they were really concerned about the use of biodegradable and that it was problematic, that goes to JBR's good faith defense.

We don't think the documents suggest anything like telling JBR to use the term biodegradable. Counsel told JBR after seeing their biodegradable logo I really do not think this will work. And counsel explained that biodegradable claims were very difficult to make and talked with JBR about some heavy caveats on the use of the term, including that you would need to disclose what you meant by it in close proximity to the word, including what you mean, how long would it take the product to break down, would it break down in a reasonable period of time which the Federal Trade Commission defines as one year, and under what conditions would it break down when disposed of in customary fashion.

So JBR's selective disclosures in the

deposition and its good faith defense are both independent reasons why it's waived privilege over the subject matter of its environmental advice. And we believe that if we did as Mr. Moore is suggesting and had a 502(D) order and allowed them to continue claiming privilege here, they would continue directing their witnesses not to answer questions at depositions beyond what they've chosen to disclose.

So, for example, they volunteered their view that their attorney had told them to use the term biodegradable and not compostable and then when asked about caveats on that advice they were told not to answer because the caveats would be privileged. And that's exactly the sort of using privilege as both a sword and shield, this is a quintessential example of what the Courts don't permit and I think both choices that JBR has made have waived privilege over this advice.

THE COURT: Okay, thank you. Mr. Moore, could you just tap the microphone and make sure it's, and try to speak into it, please, to the extent you can.

MR. MOORE: Yes, Your Honor.

THE COURT: Thank you. All right, let me ask you to start with your ninth affirmative defense here,

the good faith, you had characterized it as good faith belief. Assuming, without deciding that that's a defense to a 43(A) claim, is your good faith defense predicated on the advice of counsel?

MR. MOORE: Your Honor, I don't think we've taken a position on that yet.

THE COURT: Well that's why I'm asking the question.

MR. MOORE: Well and the reason we haven't taken a position on that yet is because they haven't served any discovery on that point.

THE COURT: I'm asking the question though, so you have an obligation to answer my question whether they've served discovery on that or not.

MR. MOORE: Understood, Your Honor. Your Honor, we did not reference advice of counsel in the affirmative defense.

THE COURT: I can read. I can read your answer, so, so far you haven't told me anything I don't already know.

MR. MOORE: Yes, Your Honor.

THE COURT: Are you predicating your good faith defense on the advice of counsel, yes, no, we don't know, maybe?

MR. MOORE: We don't know, maybe, is what I would say, because the parties have not yet reached a schedule on when they're going to reveal whether they're asserting advice of counsel as a basis for their claims or defenses.

THE COURT: Well isn't that what your witnesses have already testified to?

MR. MOORE: No, Your Honor.

THE COURT: Really?

MR. MOORE: These witnesses were not 30(B)(6) witnesses. These witnesses were individual percipient fact witnesses testifying --

THE COURT: Were they managers, directors or officers? What's Jim Roger's position with JBR?

MR. MOORE: He would be an officer.

THE COURT: Yes. I mean he testified, "upon the advice, of our attorney, which turned out to be a disaster, she recommended we change it to biodegradable."

MR. MOORE: Your Honor, I think the point with respect to what he's testifying is already revealed in the record elsewhere.

THE COURT: But that's not the relevant factor with respect to whether or not there's a waiver based

on an advice of counsel defense. The fact that it might be inferred from other documents in the record doesn't mean there is no waiver.

MR. MOORE: Yes, Your Honor, but the point that JBR is making is that if we look at the chronology, in non-privileged documents in the production, Jim Rogers says, a week before he hires counsel he says to one of his customers, this is a complex area, biodegradable claims, compostable claims, and we don't want to get in trouble so we're going to look into it, we're going to hire an expert. He then hires counsel to advise on that issue. Then a label comes out a few months later that says biodegradable. Those are all independently known facts that have nothing to do with the advice given. And he is then --

THE COURT: Well, no, but his testimony expressly references the advice. Which suggests that that's what you were relying on. I mean if you are going to offer testimony in your defense that we were concerned about whether we could use particular terms on our packaging, we spoke to an attorney and after we spoke to the attorney we used biodegradable, you are circumstantially asserting the advice of counsel as a

defense.

I mean the fact that, I don't think it makes, the fact that you're not expressly stating we spoke to the attorney and the attorney told us we could say X, Y and Z, the fact that you are not expressly articulating it that way, I don't think makes a difference.

MR. MOORE: Your Honor, I think it does make a difference.

THE COURT: Why?

MR. MOORE: Because this is not 30(B)(6) testimony, the cases they've cited relate to testimony by individuals --

THE COURT: No, but it's the testimony of an officer.

MR. MOORE: Or testimony in the context of --

THE COURT: Rogers was an officer?

MR. MOORE: He was, but his testimony is not binding as to Rogers, as to Rogers' legal contentions. He has no legal training. He's a fact witness giving his own opinion which may very well be wrong.

THE COURT: Well, no, that's incorrect. "Upon advice of our attorney, our attorney which turned out to be a disaster, she recommended we recommend we

change it to biodegradable. He's testifying to historical facts there, he's not giving an opinion.

MR. MOORE: To me, he's giving an opinion --

THE COURT: Well that may be your view of it but that's not what the language says, he's testifying to historical facts, he is not opining. He's not. You're telling me now black is white. I was born at night, but not last night, and I think I've told everybody that before.

MR. MOORE: Your Honor, he's testifying as to his view, a view which was disagreed with by others.

THE COURT: He's testifying to historical facts. That argument doesn't fly.

MR. MOORE: Well, Your Honor, with respect to, even if one were to assume that he testified as to advice given, the problem with Keurig's motion is that it overreaches.

THE COURT: How does it overreach?

MR. MOORE: Because Keurig's motion is unlimited in time, unlimited in scope. They're saying he gave a little bit of testimony with respect to one attorney's advice in 2013, and they want to say, based on that, that there's a subject matter waiver for all environmental labeling advice that any attorney has

ever given?

THE COURT: Well let me term to Ms. Torpey and clarify that, I mean my understanding is that what Keurig is seeking here are the attorney-client communications regarding the use of biodegradable, compostable or similar, let's call them environmentally friendly terms, I think you called it green washing, similar terms on the packaging. I mean is that what you're seeking or are you seeking something beyond that?

MS. BRANNON: We're seeking all of their environmental advice related to their packaging, including the advice they received from Ms. Abramson and Cobalt Law. But their good faith defense is not limited to good faith as to one aspect, they've asserted a good faith defense as to the entirety of Keurig's counterclaims. And --

THE COURT: No, but your counterclaim, this is why I asked you at the outset, your counterclaim is limited to the environmental claims on their packaging, not the calorie content or the caffeine content or some other representation regarding their product.

MS. BRANNON: Yes, Your Honor, we are only

seeking their environmental advice regarding environmental advertising.

THE COURT: Okay, go ahead.

MR. MOORE: So, Your Honor, the problem with that is it's imprecise. There was one attorney --

THE COURT: Is there environmental advertising that JBR engaged in besides this biodegradable representation on its packaging?

MR. MOORE: Yes, Your Honor, the counterclaim that Keurig has asserted basically takes issue with every label that JBR has ever done for the last six years, including the label that the attorney in question, Ms. Abramson, advised on, but that was the label back in 2013, that label changed in January, 2015. Keurig's counterclaim covers ever label after that. so their request for subject matter waiver extends to numerous other versions of the label that have nothing to do with the advice given by Ms. Abramson. Ms. Abramson and her firm were no longer representing JBR as of September of 2015. Their proposed waiver would extend to Arnold & Porter which came in after Ms. Abramson, and it would potentially extend to other firms. And so because it's not limited to the particular --

THE COURT: Well with respect -- with respect to other packaging, beyond the packaging that Cobalt advised you on, I mean are you relying on the advice of counsel with respect to that other packaging?

MR. MOORE: Not necessarily, Your Honor. One thing I want to make clear is the affirmative defense is based on many other factual circumstances. The thing to remember is this is a federal Lanham Act claim, this is not a claim under California state law. The advice they're talking about that --

THE COURT: My first question to your adversary about the nature of their claim expressly referenced Section 43(A) of the Lanham Act. So I get that.

MR. MOORE: And the problem is the advice at issue in the arbitration in California relates to a California labeling law, that's not what is at issue in the Keurig counterclaim.

THE COURT: I mean it's the same packaging, is it not?

MR. MOORE: It is the same packaging, yes.

THE COURT: Did you sue Cobalt for its advice regarding compostable versus biodegradable?

MR. MOORE: Yes, Your Honor.

THE COURT: Okay. For the life of me though I don't understand why you haven't put it at issue here given the defense. I mean if you want to tell me why it's not at issue I'm happy to hear you.

MR. MOORE: Yes, Your Honor, the defense, so the claim relates to the truthfulness of the advertising, and JBR has many factual predicates for the truthfulness of that advertising, particular certifications that JBR obtained, as well as --

THE COURT: You may have multiple justifications but if one of them is the advice of counsel then you're putting that advice in issue.

MR. MOORE: But, Your Honor, I don't think we have --

THE COURT: I mean it's a closer case, I mean I heard Ms. Torpey's argument, I mean it was a closer case --

MS. BRANNON: Ms. Brannon, Your Honor.

THE COURT: I'm sorry?

MS. BRANNON: Ms. Brannon.

THE COURT: I'm sorry.

MS. BRANNON: Sorry.

THE COURT: My apologies. There's so many talented attorneys here I lose track. My apologies.

No, I mean, you know, I asked Ms. Brannon the hypothetical of, you know, whether or not there would still be a waiver if the defense was based on a scientist at JBR, you know, putting a cup in his or her compost pile and coming back six months later and finding out that it was gone. And I understand her argument. But if one of the predicates for your good faith defense is advice of counsel, it's one of many, I don't understand why that doesn't put it at issue, why that doesn't put the advice at issue?

MR. MOORE: Well, Your Honor, that would put the advice at issue, but my point there is it's premature. We haven't done that yet. They haven't served a contention interrogatory and they haven't served a 30(B)(6) notice asking for our contentions. If they do that and then we respond and put it at issue, then that would be putting it at issue. We haven't done that.

THE COURT: But it seems like based on Mr. Roger's testimony, that horse has already left the barn.

MR. MOORE: Not necessarily, Your Honor, we may very well put in other testimony from others with knowledge of other facts that we would rely on

instead.

THE COURT: Well what about her fallback argument though that if you are doing that, the advice of counsel is still in issue?

MR. MOORE: No, Your Honor, I don't think it is because he only testified as to that she advised him whether it was biodegradable or compostable. And the nature of that advice, what the statutes say, and Ms. Brannon started to go into the details --

THE COURT: The Lanham Act doesn't say anything about biodegradable or compostable.

MR. MOORE: Sorry, Your Honor?

THE COURT: The text of the Lanham Act doesn't say anything about biodegradable or compostable, you reference what the statute says, the statute doesn't say anything, doesn't reference those terms.

MR. MOORE: Yes, Your Honor, but the, I think in the non-privilege communication before Ms. Abramson was hired, Jim Rogers had noted that there were multiple laws at issues. There was FTC, I should say there were multiple sets of regulations and guidelines at issue, there were FTC guidelines at issue and there were state laws potentially at issue. And so to the extent that he then hired an attorney to advise

regarding that, that advice, he already telegraphed in a non-privileged communication that that's what he was going to do.

THE COURT: No, but that's not the operative fact as to whether there's a waiver. I mean it seems to me, and you tell me if you have case authority to the contrary, but is seems to me that is a party testifies I was concerned about doing X, because I was concerned about doing X I spoke to an attorney. After I spoke to the attorney I felt reassured and I did X. That's just, in my mind that's just as much an assertion of the advice of counsel as if the witness testified I spoke to the attorney, I told the attorney X, Y and Z, the attorney told me X, Y and Z doesn't violate the Lanham Act and that I can do X, Y and Z. It would seem to me that those two hypothetical situations are the same.

MR. MOORE: No, Your Honor, I don't think they're the same.

THE COURT: Why not? One you're doing it by inference, one you're doing it by direct testimony, but what's the difference?

MR. MOORE: Well the problem here is that food companies, beverage companies all the time ask for advice of counsel with respect to their claims. And

one can infer that after they then changed the label that that was based on advice of counsel.

THE COURT: Why is that inference more compelling than an inference that the client decided to ignore the advice of counsel? Clients sometimes take attorneys' advice, sometimes they don't.

MR. MOORE: And there is no evidence in the record that any advice was ignored.

THE COURT: Well, there is no evidence that it was followed, either.

MR. MOORE: Yes, Your Honor, that's true.

THE COURT: So, I mean, if you want to argue the inference that speaking with counsel resulted in the client's following the advice of counsel, why are they not entitled to explore that? I mean that's the inference you want to argue.

MR. MOORE: They would be if we argue that, we haven't argued that.

THE COURT: Well Roger's testimony certainly makes that assertion.

MR. MOORE: And, Your Honor, the problem I have with that is we're not, we haven't said that we're going to rely on that.

THE COURT: But when is discovery closed,

refresh my memory, when does discovery close here?

MR. MOORE: In November. And the point I would make there is that no party has taken a position as to what they were going to rely on. I don't know if Keurig is going to rely on advice of counsel with respect to anticompetitive intent as to what actions it's taken. So I don't think they have taken a position on that or said that they are required to at this point. So, similarly, I don't think Rogers is required to at this point.

THE COURT: Well, there is some case authority that I'm aware of in the patent context, I can't remember the name of the case, there's a decision by Judge McKelvie in the District of Delaware from about 20 years ago or so, which suggests that, at least in the patent context, the determination of whether or not an alleged infringer is going to rely on the advice of counsel should be made toward the close of discovery here. But it has to be made in sufficient time for the adverse party to take discovery. I mean if the close of discovery here is six months away, and usually the close of discovery is a very hectic period, why is not now the appropriate time to make that determination?

MR. MOORE: It is if they serve an interrogatory or 30(B)(6) notice on that point, but they haven't done that yet. And in the patent case context, typically the parties will agree to a schedule where if the defendant wants to rely on an opinion of counsel, they will disclose it at a particular point in time and the plaintiff will then have the opportunity after that to take discovery on that point.

The parties he could very well agree to a schedule like that, but they haven't done so yet. And if they do so, then Rogers will comply with that, and we would expect, likewise, Keurig would comply with that with respect to disclosing any legal advice it wishes to rely on with respect to intent issues as to Rogers' claims against Keurig.

THE COURT: The packaging that Cobalt gave you advice on, JBR used that packaging from when to when, or does it still use it?

MR. MOORE: Yes, Your Honor, the packaging came out around October of 2013. Then in January of 2015, a third party non-attorney contacted JBR as well as JBR's customer, Costco, and asserted that that packaging violated California law.

THE COURT: Just give me those dates again, was it October, 2013?

MR. MOORE: Yes, October of 2013 was when the 97 percent biodegradable packaging was introduced.

THE COURT: And it was used through when or are you still using it?

MR. MOORE: It was abandoned in early 2015. And the reason it was abandoned is because a non-attorney came to Rogers' customer, as well as Rogers, and said, hey, we don't like this packaging, we think you're in violation of California law. Rogers then, in an abundance of caution, stopped using the packaging. It had nothing to do with any advice of counsel at that time, it had to do with the factual assertion of a third party non-attorney.

THE COURT: All right. I've asked you a lot of questions, is there anything else you want to tell me, I'll try not to interrupt you. Go ahead.

MR. MOORE: Your Honor, Ms. Brannon referenced some documents that JBR inadvertently produced and started to go into the content of those documents. I would note that this reflects a change in Keurig's position. Keurig did not include any of those documents in its letter briefing and it simply

referenced them in oral argument for the very first time without us having any opportunity to rebut that, and, Your Honor, the documents aren't even before you. So to the extent that they were going to rely on that as part of the basis for the motion, there would need to be further briefing on that issue.

THE COURT: All right, anything else you want to tell me? Anything else you want to tell me?

MR. MOORE: Your Honor, Ms. Brannon also stated that the claims related to green washing and focused on biodegradable and compostable. I would just note that Keurig's counterclaim also includes claims related to no plastic cup and claims related to more recent versions of the labels and pat of the concern about overreach is that their request for a subject matter waiver would extend to those more recent labels. They don't even have anything to do with biodegradable or compostable.

THE COURT: I just want to make sure I'm clear, Cobalt only gave you advice with respect to the packaging or gave your client advice with respect to the packaging used from October '13 through early 2015, is that right?

MR. MOORE: A couple of clarifications there.

Cobalt continued to be involved until September of 2015. So they did advice on one further round of packaging which was packaging relating to a no plastic cup package that was also used in 2015. And they then ceased to be involved shortly after the California District Attorneys sent a letter to JBR. At that point, JBR, as well as its customer, Costco, hired Arnold & Porter to defend JBR with respect to the claims asserted by the California District Attorneys. And shortly after Arnold & Porter was hired, Cobalt ceased to represent JBR.

And so the point there, Your Honor, is that any labels after September of 2015, Cobalt had nothing to do with. So their waiver would extend to other counsel that had nothing to do with the advice that was discussed in deposition testimony of Jim Rogers and Tom Garber.

THE COURT: All right, anything else?

MR. MOORE: Thank you, Your Honor.

THE COURT: Okay. Ms. Brannon, let me ask you a question that I didn't ask you before, something that I touched upon with your adversary, there is, as I said, there is case authority at least in the patent context, because of the significance of asserting an

advice of counsel defense and the fact that it does waive attorney-client privilege with respect to a number of communications. There is some case authority that that determination should be made toward the close of discovery when all the other facts are known and the parties are in a position to make an informed decision as to whether to rely on the advice of counsel defense. Is a finding of waiver premature here? I mean is this something that we should set a schedule for both sides to formally commit to relying on advice of counsel or not relying on the advice of counsel?

MS. BRANNON: No, Your Honor.

THE COURT: Why not?

MS. BRANNON: It's not premature here for two reasons, and I think we're mixing a bit the two different independent bases for a finding of waiver here. One is the intentional disclosures and depositions, that does relate to Ms. Abramson and Cobalt Law's advice. Those were selective, self-serving representations, JBR chose not to testify or answer questions about caveats on that advice. And because --

THE COURT: Right, but if they don't rely on

it at trial or in a summary judgment motion, is discovery on it appropriate?

MS. BRANNON: Yes, Your Honor.

THE COURT: Why?

MS. BRANNON: Discovery is appropriate here --

THE COURT: If they don't assert it, I mean if they don't assert it as a defense, assuming it is a defense, if they don't assert it as a defense, how is discovery on it appropriate?

MS. BRANNON: Discovery is appropriate because under Federal Rule of Evidence 502, when there is a disclosure in a federal proceeding, that waives privilege as to other withheld communications if the waiver --

THE COURT: Yeah, but you've got Rule 26 which says to take discovery it's got to be relevant to a claim or defense.

MS. BRANNON: Sure, and the disclosure here --

THE COURT: I think it's also in Article 4 of the Federal Rules of Evidence, but go ahead.

MS. BRANNON: The disclosure here, there's three conditions, the disclosure has to be intentional, it has to concern the same subject matter as the undisclosed material --

THE COURT: No, but my question is relevance which you are not addressing. If they don't assert the advice of counsel as part of their affirmative defense, how is it relevant, if it's not relevant you never get to questions of privilege or waiver.

MS. BRANNON: Well they have now put into the record their claim that they were given this advice, and we should, because they made, and the cases we've cited are very similar to this one in that there was a selective intentional disclosure of a portion of the advice and we should be --

THE COURT: Well, *Bilzerian* at least was at trial, we're not at trial yet.

MS. BRANNON: That's true. But not all of the cases we sited were at trial, and they dealt with discovery. The *Chipotle* case, for example, that was, the Court ordered that --

THE COURT: No, but come back to my question. Let's assume that a week from now JBR sends you a letter saying we've reviewed the matter and we have decided that we are not going to rely on the advice of counsel directly or indirectly in any way, shape or form in the defense, in our defense against your Lanham Act claim. Wouldn't that take the issue of the

advice of counsel out of the case entirely?

MS. BRANNON: No, Your Honor, well I would say a couple of things. We have more than Lanham Act claims, we also have California law claims. If they withdrew their entire good faith defense, then if that were the only basis for waiver then that would end the matter but we do have the independent intentional disclosures. They are asserting good faith. One cannot assert a good faith defense that one had a good faith belief in the propriety of their actions without opening up advice of counsel. So they have already asserted that defense affirmatively and under *Bilzerian, Chipotle* and the other cases I've cited, we are now entitled to see the remainder because of that asserted good faith defense, even if they try to argue that they weren't relying on advice of counsel.

I would point, Your Honor, to their letter --

THE COURT: Are you though taking an inconsistent position by also arguing that good faith is immaterial?

MS. BRANNON: No, Your Honor, be believe as a matter of law that this is not a valid defense and we do intend to argue that at summary judgment, but the time for discovery is now. And they have asserted --

THE COURT: Well, no, I mean if it's legally deficient you could make a Rule 12 motion. I mean the validity of your argument regarding whether it's a defense is a matter of law, not a matter of fact, as I understand it.

MS. BRANNON: It's both. We both believe that the facts --

THE COURT: You're saying given some facts it could be a valid defense to a 43(A) claim?

MS. BRANNON: No, Your Honor, we believe neither the law nor the facts support it and we want discovery on the facts now because --

THE COURT: No, but how does, your contention that it's not a valid defense, does that turn on facts or does that turn on law?

MS. BRANNON: Both.

THE COURT: How does it turn on facts? I mean if you're saying it turns on facts, that suggests that there is some factual circumstances in which it could be a good defense to a 43(A) claim.

MS. BRANNON: Oh, no, sorry, Your Honor, I mean to say that we believe it is neither factually nor legally supported, but we would like discovery on the factual aspects of that. I would, in their letter

of April --

THE COURT: Is it fair though, I guess this is sort of my concern, let's assume that I grant your motion to compel and you get discovery on some of the communications or some set of communications as to which JBR is asserting privilege, and then later on down the road you argue that, you make a Rule 12 motion or you make a Rule 56 motion arguing that good faith is not a defense to a 43(A) false advertising claim and you prevail on that, is that a fair result? I mean then you've taken, you've successfully argued that they can't assert the defense anyway but you still proved their attorney-client communications with respect to something which ultimately becomes a nonissue in the case. Is that fair?

MS. BRANNON: I believe it is, Your Honor.

THE COURT: Why?

MS. BRANNON: This is just not about their good faith defense but their sort of broader story of the case. Their witnesses volunteered at depositions that they are good actors and that they were given bad advice by their lawyer. This is something that they affirmatively used but they are not trying to shield the caveats on that advice. And even in their letter

of April 24 --

THE COURT: Let me interrupt you and ask Mr. Moore a question, is JBR claiming that the testimony that's cited by defendants in their letter was inadvertent?

MR. MOORE: No, Your Honor, we're not claiming it's inadvertent.

THE COURT: Okay. All right, go ahead.

MS. BRANNON: In their letter of April 24, Mr. Moore says that they have not yet decided if they're pointing to advice of counsel as a basis of their belief in the propriety of their actions. And we think under the law they can't set aside advice of counsel, but their letter --

THE COURT: I'm sorry, say that again, I just didn't hear you.

MS. BRANNON: So --

THE COURT: I just didn't hear, I'm not quibbling with what you said, I just didn't hear you.

MS. BRANNON: Sure, you asked Mr. Moore if they have taken a position on whether advice of counsel contributed to the good faith belief and he said they have not yet decided that. We believe, under the law, that when you assert a good faith

defense you open up discovery on advice of counsel you received on that subject to see whether you listened to it or not and how it informed your understanding of the law.

But also, in their letter of April 24th on the first page, the last complete paragraph, JBR, Mr. Moore writes "JBR's managers realized in 2013 that the law relating to these issues was not something that JBR had expertise in, so they looked to hire an attorney with that expertise. So they are pointing in their own letter on this issue to their reliance on their counsel, which is something that their witnesses were affirmatively pushing. And as Your Honor said, the horse is out of the barn, this is exactly under the case law what creates a waiver.

And so we believe we are entitled to their full advice. And Mr. Moore says Ms. Abramson only advised on product labeling between 2013 and 2015. We don't think, well first their good faith defense is not just as between 2013 and 2015, it's to all of our claims, and we believe they've opened up their advice on environmental law, environmental advertising because of this defense across the full period. But also their privilege log did not match those dates,

they had --

THE COURT: I'm sorry, the privilege log did not what?

MS. BRANNON: Did not match the dates that Mr. Moore just gave you. The privilege log that they had produced to us claimed privilege over communications with Ms. Abramson dated from 2011 through 2017. Yesterday, without any explanation, we received a revised privilege log from JBR and that changed the dates on a bunch of the entries. So it now shortens the period by changing all of the dates, it shortens the period when they were communicating with Ms. Abramson, in particular. We're still working to understand the scope of their inexplicable revisions to the log and we'll need to confer with them to understand, it seems that there were very widespread errors in their log. But again, even if you think that Ms. Abramson's advice was more limited in time and it's not at all clear that it was, they are asserting a broad good faith defense across the period.

Also, we don't believe that Ms. Abramson's advice was limited to biodegradable and compostable because we've seen the documents and we didn't argue about this in our letter because the issue of the

appropriate use of inadvertently produced documents was still pending at the time. Your Honor issued an order on that on May 7, clarifying that if a party became aware of the document and reviewed the document before the producing party claimed privilege, therefore you could use it.

THE COURT: Your Lanham Act, your 43(A) claim, is this is, I come back to what I asked you early on in your argument, your 43(A) claim, as I understand it, and tell me if I'm wrong, is limited to the, let me refer to it as the environmentally friendly representations that you're saying JBR made on its packaging.

MS. BRANNON: Yes, Your Honor, she advised on other types of environmental representations. And I would, I think --

THE COURT: But we agree, let me just interrupt you and ask you a question, I mean do we agree that if there is a waiver here, the waiver is limited to advice that Cobalt gave with respect to environmentally friendly representations?

MS. BRANNON: As to the intentional disclosures, yes, believe that it's limited to --

THE COURT: No, I mean if that's the scope of

your 43(A) claim, I mean she advises them on non-environmental issues, I'm not sure how that's implicated in the 43(A) claim.

MS. BRANNON: No, no, I was going in a different direction which is that as to their good faith belief and the propriety of their action defense, we believe that also waives as to Arnold & Porter's environmental advice. So the intentional disclosures are a waiver, at least as to Cobalt Law's advice, but we believe, and there is case law suggesting, that once you waive on a subject like environmental advertising advice, you've waived as to the entirety of the subject. And there is, the Magistrate Judge has broad discretion.

THE COURT: Hold on a second though, is there a claim though that their packaging after October 15 contained, was false regarding the environmental attributes of their cups?

MS. BRANNON: Yes, they did not stop using the term biodegradable in 2015, Mr. Moore was incorrect about that. We've asked their witnesses, we've seen their materials, they continued using that term, they are even using the term biodegradable in places. Today they use 100 percent compostable. Today, they're

using a range of claims through today and starting as early as 2011 they were using the term biodegradable, not just, they've used different terms on their labeling over time and they have also used different terms in advertising to customers, to retailers, on their website, and we believe that they have made deeply misleading representations about the environmental benefit of their packaging, including that their products contain no plastic when they're made of PLA, they're made of plastic, and representing that they biodegrade and compost when disposed of in customary fashion, which they don't. Their witnesses have acknowledged that customers overwhelmingly throw these in the trash and they don't biodegrade in the landfill or compost.

THE COURT: All right, why don't you finish your comments then I've got -- well let me ask my questions right now actually. Let's assume I issue an order in your favor and then JBR responds by saying we are withdrawing our ninth affirmative defense, would you still be entitled to discovery on this issue?

MS. BRANNON: Yes, Your Honor.

THE COURT: Why?

MS. BRANNON: Because of the intentional

disclosures, because the horse is out of the barn.

THE COURT: No, but isn't it, you're overlooking Rule 26 though, doesn't it have to be relevant to be discoverable?

MS. BRANNON: Yes, Your Honor.

THE COURT: Whether it's privileged or not it's got to be relevant.

MS. BRANNON: We believe it is relevant to the communications --

THE COURT: My hypothetical is they've withdrawn their ninth affirmative defense.

MS. BRANNON: Yes, Your Honor.

THE COURT: How is it relevant?

MS. BRANNON: It's relevant to the -- so we believe that the claims that they have made are misleading, false and misleading to consumers, and we believe that these communications reflect on how misleading their advertising was.

THE COURT: But my hypothetical, they're not relying on good faith.

MS. BRANNON: That's correct. We believe the communications are relevant --

THE COURT: So the truth or falsity, it's either true or false regardless of what the attorney told them?

MS. BRANNON: The advertising is, we believe that the withheld materials are directly relevant to the misleading nature of the advertising which is relevant to our claims.

THE COURT: Well, I mean either, the attorney's comments are not going to make them more or less biodegradable or compostable, or whatever term you want to use, I mean how is it relevant then?

MS. BRANNON: We believe that her, the communications at issue go to consumers' understanding of the claims and go to their misleading nature. And we believe that the --

THE COURT: How does what the attorney says bear on whether or not a consumer understands what biodegradable means?

MS. BRANNON: We believe that she was discussing these issues with him including the Federal Trade Commission's Green Guides and other issues that have to do with the misleading nature of their advertising. And we believe that JBR intentionally chose to disregard aspects of that advice, very inconsistent with the testimony they've given on the record, and we believe that that goes to the fact that their advertising is deeply misleading.

THE COURT: All right. And let me ask you

another question which really has come up I guess in my discussion with Mr. Moore, is Keurig contemplating relying on the advice of counsel with respect to any of the claims here, and, if so, should we not set a date for Keurig to commit whether it's going to rely on advice of counsel?

MS. BRANNON: I don't believe Keurig has asserted any affirmative defense of advice of counsel or good faith.

THE COURT: Is there any potential that it's going to assert good faith or the advice of counsel in the future?

MS. BRANNON: I do not believe that Keurig is planning to assert a good faith defense, advice of counsel defense of the sort that JBR is asserting here.

THE COURT: Well should we set a deadline for Keurig to commit on that one way or the other?

MS. BRANNON: Yes, if Your Honor thinks that is appropriate for all parties to have a deadline to commit.

THE COURT: All right. Anything else you want to tell me?

MS. BRANNON: No, Your Honor.

THE COURT: It's my practice to give both sides an equal number of chances to be heard, so Mr. Moore, if you want to say something in sur-reply, go ahead.

MR. MOORE: Yes, Your Honor. Your Honor, I just want to address a few of the assertions just made. With respect to this notion of the good faith defense, I would note that the context here I think is a little bit different, and Keurig's theory, the problem I have with it is it involves a lot of speculation. They, in the patent case example that you mentioned, or in the cases cited by Keurig, you would have an opinion of counsel that the party would then rely upon as a basis for its good faith. But under Keurig's theory here, they're saying JBR is going to rely on the advice of counsel, of an attorney that JBR elsewhere called out for giving bad advice, and so I think their theory just doesn't make any sense factually.

THE COURT: Well, no, I'm not sure that's accurate. I mean in the patent context, if there is a claim of intentional infringement, the advice of counsel is usually relevant with respect to damages and you only get to damages if the advice of counsel

was wrong. So I mean the fact that the advice of counsel was wrong doesn't mean it comes out of the case. I mean in the typical patent case, the accused infringer will offer the advice of counsel as a defense to damages for intentional infringement, not to liability. I mean whether or not the accused product infringes doesn't, is independent of the advice of counsel.

So I mean the fact that the advice of counsel turns out to be wrong or that even that JBR in this case subsequently asserted malpractice claims against the attorney, I'm not sure how that has anything to do with anything.

MR. MOORE: Well, Your Honor, I think it does because in the typical instance where one would rely on advice of counsel, one would rely on advice of counsel if they wanted to assert the advice was correct. I don't think they've --

THE COURT: Well, no, the advice of counsel doesn't, you know, whether or not you violated the Lanham Act, you can't offer testimony on an attorney as to whether or not you violated the Lanham Act, that's a decision for the fact finder.

MR. MOORE: Yes, Your Honor.

THE COURT: I mean, you know, take a typical negligence case, plaintiff is run over by defendant's vehicle, defendant can't call an attorney to say, oh, no, the defendant wasn't negligence here, I've tried negligence cases for 50 years and the defendant is not negligent, you can't call an attorney to argue, to offer testimony on liability. I mean not that I've ever seen.

MR. MOORE: And, Your Honor, I think that goes to the point is that they're assuming that we're going to rely on advice of counsel for this good faith defense when we have a number of factual predicates that have absolutely nothing to do with advice of counsel.

THE COURT: Well what are the facts, independent of advice of counsel, that you're relying on in support of your good faith defense?

MR. MOORE: Well, Your Honor, I think there was a deposition just last week that Keurig took for a full day of one of the people involved in the labeling, and in that deposition it was noted that this was kind of a new area of advertising, a new area of law, it was very unsettled. And JBR made very diligent efforts in terms of obtaining certifications and vetting each version of its advertising, each

version of its packaging.

THE COURT: Yes, and in your letter, I mean this is what Ms. Brannon cited, "in June, 2013, JBR hired Cobalt LLP in California and began communicating with the law firm concerning environmental packaging language for its one cup product." I mean isn't that, isn't what you've just described exactly the consultation with counsel that's at issue here?

MR. MOORE: No, it's not, what I'm referring to is JBR made efforts, it went out to its suppliers, it studied the different certifications that were available, it had, it consulted with environmental groups. It engaged in all sorts of efforts over many years to vet its packaging that had nothing to do with any advice it sought from any attorney.

THE COURT: All right.

MR. MOORE: So those would be the independent predicates. With respect to the dates issue that Ms. Brannon identified, we discovered after receiving their reply letter that there were some data entry errors in the privilege log, but I can represent, based on having been involved in the separate litigation against Cobalt, that the dates of the representation were from June 7th of 2015, to late

September -- sorry, June 7th of 2013, to late September of 2015. And those are the correct dates.

Ms. Brannon just noted that their proposed waiver would extend to all Arnold & Porter communications which would then sweep in an additional two and a half years of communications from August of 2015 through 2018, because Arnold & Porter was involved in defending both JBR, as well as its customer, Costco, in this negotiation with the California District Attorneys.

THE COURT: Well are you asserting good faith with respect to the entirety of their packaging claims? I mean I suppose you've got, among your defenses to their 43(A) claim, I suppose you could argue good faith which may or may not be a defense. And I suppose you could also argue that your representations are accurate. Are you asserting good faith with respect to the entirety of their 43(A) claim?

MR. MOORE: Your Honor, I think at the moment our defense would cover the entirety of their claim, yes.

THE COURT: Okay.

MR. MOORE: And so in terms of the dates,

their proposed waiver would basically extend to cover all these Arnold & Porter communications over several years as well as other firms. And that would be inappropriate in terms of the breadth because there was no testimony, even if one assumes their theory based on the testimony given, there was no testimony given as to what Arnold & Porter advised JBR or any other firm advised JBR with respect to environmental labeling.

Ms. Brannon also asserted that we misrepresented the dates of when the particular labels stopped, so I want to clarify that point factually. The label that was the subject of the testimony. The label that was at issue in the Cobalt matter was a particular label that JBR had from October of 2013 through early 2015.

THE COURT: Was it still in the retail marketplace after 2015?

MR. MOORE: Yes, Your Honor, the label was phased out, which means that, and what's typical in this industry, is not to go and pull every label --

THE COURT: I presume that when JBR stops using a label it's still in the marketplace for a sell off period.

MR. MOORE: Yes, Your Honor. And so when she references that after 2015 there were still labels out there, well yes, some products sell slower than others do, and some customers forget to change their website so they might have five year old pictures on their website, but that doesn't change the fact that JBR, in terms of what was in its control, phased out that label in 2015.

THE COURT: Anything else you want to tell me?

MR. MOORE: Thank you, Your Honor.

THE COURT: Okay, I'm going to reserve decision on the waiver issue. There was a letter that I received yesterday from Winston & Strawn which I got it yesterday afternoon, I'm not when defense counsel got it here, I'm not sure if defense, if the defense is in the position to address any of the issues in there today or not.

MS. NEWTON: Your Honor, we saw that it was filed as we were walking out the door to head to the airport to come here, so we are not prepared to address the issues, although we would like an opportunity, including as to those many issues that we understood they were not raising, to respond to that in a letter brief.

THE COURT: Well, don't respond to what they're not raising.

MS. NEWTON: I said that wrong.

THE COURT: I'll have plenty to read.

MS. NEWTON: Yes. No, I said that wrong. I mean they've accused us of spoliation, Your Honor, and I take that very seriously, and I want to respond to it.

THE COURT: Well at this point I think they just want to take discovery on that, they're not making an application for sanctions.

MS. TORPEY: Yes, Your Honor, that's correct.

THE COURT: So I don't think there's any issue there that's really ripe for determination now.

MS. NEWTON: Well I agree, Your Honor, it's not ripe for determination, but having put that on the public record, Your Honor, I would like a little latitude to respond to their misrepresentations, please.

THE COURT: To what end?

MS. NEWTON: To correct the public record. They've accused me, my firm --

THE COURT: Well if you want to put on the public record with the understanding that I'm not

going to read it, because there is no decision for me to make, you know what I mean?

MS. NEWTON: Yes.

THE COURT: It sort of is a burden on the Court to be reading things that don't require any action.

MS. NEWTON: If I understand Your Honor then, you're saying that you wish Treehouse had not burdened the Court by putting that --

THE COURT: Yes, I mean if there is something parties want to put before me for decision, that's one thing, but, you know, to went moral indignation or dissatisfaction with what the other side has said, I'm not, you know, I read it and I get to the end of it and I ask myself why did I read this.

MS. NEWTON: I hear you, Your Honor, we may just drop a footnote, but we'll try not to burden the Court.

THE COURT: Look, I'm not telling you, you can put in anything you want, but it's just, you know, from my point of view, when I get things that don't require judicial action, as I say, when I get to the end of the letter the question I ask myself is why did I read this, why did I spend 20 minutes reading this

or half an hour reading this.

MS. TORPEY: Your Honor, if I could just respond to that, I apologize if we burdened you in any way. We thought it was important to raise these issues now because we expect that we'll require further Court intervention on these issues in a quick manner.

MS. NEWTON: Can we take that letter off the record, Your Honor --

THE COURT: There's no way to unfile something, as far as I understand it.

MS. NEWTON: Okay, me either, but I thought I'd ask.

THE COURT: All right, when do you want to respond by?

MS. NEWTON: A week from today?

THE COURT: Fine.

MS. NEWTON: Thank you.

THE COURT: All right, so that's going to be May 29, right, today is the 22nd?

MS. NEWTON: I believe that's right, yes, Your Honor.

THE COURT: Okay. Anything else we should be considering from plaintiff's side?

MR. BADINI: Your Honor, there are a handful

of issues in that letter where we did seek Court intervention towards the end.

THE COURT: Right, no, I know that, but I think they're entitled to a time --

MR. BADINI: Absolutely, I'm not, that's not what my point is. My point is there were a number of statements and positions taken by Keurig today that I think implicate interrogatory number 8. And so I would either like to supplement orally our points for a few minutes, or be entitled to a short reply.

THE COURT: All right, well why don't you supplement your points orally so that we can, so the defense will have everything in front of it when it submits their letter, okay?

MR. BADINI: Thank you, Your Honor. So interrogatory number 8 relates to our sham litigation claim that we have in this case. And the sham litigation claim relates to two lawsuits that Keurig brought shortly after competitive cups came into the market in 2010, one against Treehouse and one against Rogers. Those lawsuits were quickly disposed of by the District Courts and at least the Treehouse case went up to the Federal Circuit and the Federal Circuit said a number of things including the fact that

Keurig's theory was in direct violation of Supreme Court precedent in the *Quanta* case, and said, and I quote, "Keurig is attempting to impermissibly restrict purchasers of Keurig brewers from using non-Keurig cartridges by invoking patent law to enforce restrictions on the post-sale use of its patented product." It called it a tactic that the Supreme Court had explicitly admonished.

There is no question that this claim --

THE COURT: Hold on a second, before you go on could you just, I don't know if it's in your letter, can you give me the cite for the Federal Circuit case if you have it handy?

MR. BADINI: I have the case, it's 732 Fed.3d 1370, *Keurig, Inc. v. Sturm Foods,* which is one of the Treehouse plaintiffs.

THE COURT: Okay. All right, thank you, go ahead.

MR. BADINI: The standard for proving that cause of action is simple, we, as plaintiff, have to show in the sham litigation claim, that the litigation which ended was brought in objective bad faith and subjective bad faith. So it was objectively baseless and subjectively baseless. There is no reasonable

debate that the subjectively baseless claim has injected into that cause of action the good faith or lack of good faith of Keurig in bringing that litigation. That is now a part of this case.

And interrogatory number 8 simply asks the question what facts are you relying on, or did you rely on, in bringing that lawsuit, what historical facts, to use Your Honor's term, and are you relying on a legal opinion, yes or no? They won't even tell us if they're relying on a legal opinion, yes or no.

I heard Ms. Brannon today say that if you rely on historical facts to support your intent, which they have to tell us if they're doing or not in response to our sham litigation claim, if you're relying on historical facts you necessarily waive privilege as to any legal opinions. So that's why we have to know if there's any legal opinions and we have to know if they're relying on any historical facts. If they are, we can come back to Your Honor and argue the waiver point.

But I think it's an excellent idea what the Court suggested, that the Court set a deadline for both sides to say are you relying on any attorney opinions or attorney communications for any claim or

defense in this case. And we encourage that order, but I only hesitate to point out that that order doesn't get us all the way home with interrogatory number 8. Because not only do we want to know whether there's any legal opinions, we need to know what facts are they relying on in support of those lawsuits which were summarily dismissed by the Federal Circuit.

And I guess the only point of my supplementing today is to point out there has to be one set of rules for both sides. If JBR has found to have been waived legal opinions because they rely on facts, then the same set of rules have to apply to Keurig. If they rely on facts and there are legal opinions on the same subject, in an attempt to show their good faith they've waived.

THE COURT: Well, I'm not sure that everything you said follows. Let me just, I'm not sure we have a disagreement here. I mean with respect to the 43(A) claim that I was discussing earlier, I suppose there are at least two defenses. One defense is my advertising is 100 percent accurate, okay. What I say about my product is one of the true characteristics my product has. A second defense, which may or may not be a defense, the case law is, some may deem it unclear,

is good faith. If one is relying on historical facts, we've done tests and our tests categorically show that Ivory Soap is 99.44 percent pure, and our advertising to that effect is accurate advertising, I don't think by any stretch of the imagination relying on that type of historical fact would implicate good faith. Do you disagree?

MR. BADINI: Well that's not what Keurig said today, I heard Ms. Brannon to say that in an assertion of good faith if you rely on the, you used the example of the pod in the compost heap, and if you rely on a witness saying after six months or so the pod was gone, does that waive legal opinions on that same subject, I heard Ms. Brannon say yes. And all I'm saying is if it's true --

THE COURT: Well she said yes, whether or not I find her argument persuasive is still up in the air.

MR. BADINI: Okay. But we don't need, at least as far as --

THE COURT: But let me come back to my example, I mean if the claim were against Ivory Soap and Ivory Soap in its defense says we have done a bazillion lab tests and the lab tests all show that Ivory Soap is, in fact, 99.44 percent pure, and that's

our defense to, you know, some other company's 43(A) claim, would that defense by Ivory Soap implicate the advice of counsel in any way, shape or form?

MR. BADINI: Not necessarily, Your Honor. But if you change the hypothetical to one that you used earlier and say I spoke to my counsel and without telling you what he or she said I felt more comfortable --

THE COURT: Now that I think clearly is an indirect assertion that the attorney said was okay to do whatever the conduct was. But, no, I mean if the defense to a 43(A) claim is the objective accuracy of the advertising, I don't think that gets into advice of counsel in any way, shape or form.

MR. BADINI: I think that's correct, Your Honor.

THE COURT: Okay.

MR. BADINI: But I have a couple of points.

THE COURT: Okay.

MR. BADINI: One is I don't think you need to reach from the Treehouse interrogatory 8 point, I don't think you need to reach waiver yet. We haven't briefed waiver. All we want is a response to our interrogatory. And as part of that response they

should disclose the facts and whether there is a legal opinion. They can say there's a legal opinion but we're not relying on it, that's fine, or they can say there's a legal opinion and we are relying on it. That's all, we just need to know one way or the other.

Thank you, Your Honor.

THE COURT: All right. And since that was in the nature of supplementation of plaintiff's position, I don't think I need a response now, that's something you're going to respond to in your letter. That was effectively a response, a supplement to his letter of yesterday.

MS. NEWTON: That sounds, that's how I understood it, Your Honor.

THE COURT: Yes, okay. All right, great. All right, anything else from plaintiff's side?

MR. MOORE: No, Your Honor.

THE COURT: Anything else from defendant's side?

MS. BRANNON: No, Your Honor.

THE COURT: Do counsel, I just want to try to anticipate, which may be a dangerous thing to do, anticipate an issue, there were, the letter that I got from Keurig on Friday referenced two depositions, is

there an issue with respect to allocation with respect to, I think it was Staples was the other deposition?

MS. BRANNON: Yes, Your Honor, there is.

THE COURT: I'm inclined, well is there a reason to depart from what I did yesterday with respect to Office Essentials I think it was?

MS. BRANNON: We believe there is, Your Honor.

THE COURT: Go ahead.

MS. BRANNON: And I would say on the Corporate Essentials deposition obviously we read your order and it is going forward this morning. We are disappointed, there are nine lawyers who are actively taking depositions for Keurig, three are in this courtroom because we were scheduled to argue on pending issues, one is on a plane to New Orleans for the Reilly Foods deposition tomorrow in this matter, one is in South Carolina for the Hartley deposition also in this matter, two are in court on other matters, and one is on call for jury duty. So that left Ms. Danzig, who had to change her vacation plans and an international flight to New York to handle the deposition. And we certainly understand things happen. We do believe that Federal Rule 32(A)(5) has a default minimum of 14 days notice for good reason and we would note that the

parties here agreed to give 14 days notice, that didn't happen here.

THE COURT: Is there an issue with regard, I mean what is your application with respect to Staples, I thought the issue was allocation with respect to Staples, is it something else?

MS. BRANNON: No, it is allocation as to Staples, I was just speaking to the Corporate Essentials Deposition. We do think --

THE COURT: Okay, but that I've already ruled on, okay?

MS. BRANNON: Okay.

THE COURT: So that one is done. I realize, you know, I realize, you know, the only thing I can do where both sides leave happy are marriages, so go ahead.

MS. BRANNON: We believe with the close of fact discovery six months out there is room for professional courtesy and cooperation.

THE COURT: But tell me about the allocation issue on Staples, okay?

MS. BRANNON: Okay. So as to Staples, we believe that it makes sense to split time evenly between the two sides and we understand that as to

Corporate Essentials Your Honor's instruction is that the plaintiff's side gets four and a half hours and then Keurig will get two and half hours and then if the witness chooses to say longer then Keurig can have more time, if the witness chooses to call it a day exactly at seven hours, then Keurig can come back to the Court. And we understand that Your Honor may be willing to order third parties to sit for more hours, you know, Keurig does really want to minimize burden on third parties. Corporate Essentials is not one of our partners, we want to minimize burden on them, as well, but we also want to minimize burden on our partners. Staples is an important partner. You know, with all of these partners we don't want to be in a position of motions practice and dragging them into court if they don't want to sit for longer than seven hours. So it's not a light thing to do.

We do believe that the best approach here would be for the sides to cooperate and where both sides need a substantial amount of time, the fair approach would be to split that evenly. And in their letter, plaintiffs said that there are five separate groups and, therefore, they need more time. And we didn't want to file the day before this hearing a long

point by point response to that. But to the extent that there's variation between the cases, different issues like class certification or damages, Keurig has to respond to all five of those cases. So we believe that these even split is fair, that's what Your Honor did for the overall allocation of party deposition time and we continue to think that makes sense.

Also, Your Honor's order focused on cross examination and making sure that Keurig has adequate time for cross examination on plaintiff's topics. But with these witnesses, we do have affirmative testimony that we seek that may be on topics that plaintiffs are choosing not to explore because they're not good for plaintiffs and we don't think two and a half hours with Staples, which is a major partner referenced in both of the competitor complaints, we don't think two and a half hours allows us adequate cross examination and affirmative testimony.

THE COURT: Is Staples in a friendly relationship with Keurig? The reason I ask the question, I mean, I presume at some point a summary judgment motion is going to be made in this case and, you know, the law is a witness can't contradict in an affidavit the witness' testimony given at a

deposition. If there's a conflict between a witness' summary judgment affidavit and the deposition testimony, the deposition testimony trumps the affidavit. But as far as I understand the law there's no prohibition about submitting an affidavit from a witness that goes beyond what the witness testified to in her or her deposition. In other words, if a witness is not asked about a topic at the deposition, as far as I understand the law there's nothing that prohibits a party from submitting an affidavit from the witness addressing topics not addressed in the deposition.

MS. BRANNON: I would not bank on anyone --

THE COURT: But let me come back to my question, I mean is Staples a friendly witness to Keurig or --

MS. BRANNON: I don't think they're either friendly or actively hostile. I don't think that they're prepared to do us favors or, they've been very clear that they have no intent to sit beyond seven hours and that they will do what they need to do to protect their right. So if we go in and it's four and a half hours for plaintiffs, two and a half hours for Keurig, I think they're not going to choose to grant extra time because they like us. I mean they'll make a

decision about how much motion practice will cost them and what's in their interest, but I think they'll make their own decision about that. But I would not want to place a bet that they're going to necessarily give a minute past seven hours.

THE COURT: Well, you know, sort of the practical realities are though, I mean, look, if you get two and a half hours and you need another hour, you know, look, Staples can do, the third parties, any third party can do what it believes is appropriate. But, you know, the transaction cost over a motion to compel a third party to sit for another hour, just the transaction cost of the motion is going to far exceed whatever burden sitting for another hour would impose. But Staples will make its own decision in that regard I think.

MS. BRANNON: Yeah, I think it's their own decision and they're making a decision about whether Keurig wants to pull them into Court. Does Keurig want to go, you know, go into motion practice against their partner. And so if the dynamic is whoever notices first gets four and a half hours and the other party gets two and a half and then gets to choose if they want to take it to Court, you know, that sets up a

very bad dynamic, Keurig does not want to be --

THE COURT: Is Corporate Essentials and Staples pretty much in the same position? I mean with respect to the litigation, with respect to this action are Corporate Essentials and Staples pretty much counterparts, do they play the same role in this litigation?

MS. BRANNON: No, I would put them in different buckets.

THE COURT: How are they different?

MS. BRANNON: Corporate Essentials is a former KAD, a former Keurig Authorized Distributor, they left Keurig's network years ago and they're actively doing what plaintiff's say is impossible which is they're selling Keurig brewers and also other brewers and Keurig portion packs without having a direct relationship with Keurig. They're friendly with plaintiffs. Plaintiffs have been doing all the interfacing with Corporate Essentials so they're, but they're a distributor. When they left Keurig's network they partnered up with another competitor who is not in this litigation. There are many portion pack competitors who are not in this litigation, and so they've been working with other multiple portion pack

competitors and they're also selling Keurig's packs. So they're the distributor and Staples is, they distribute but they are also a major retailer and --

THE COURT: They distribute what?

MS. BRANNON: They're a retailer, as well, Staples has retail stores.

THE COURT: No, but are they an authorized distributor?

MS. BRANNON: Staples, I believe, is still a Keurig authorized, well maybe not, I can't tell, Mr. Badini is shaking his head. I think they are still a Keurig partner.

THE COURT: If Staples is not, are they then in the same position as Corporate Essentials?

MS. BRANNON: I believe Staples is still a Keurig partner.

THE COURT: Well, and when is the Staples deposition scheduled for?

MS. BRANNON: I believe it's June 7, but someone can correct me about that one.

MR. MOORE: It is June 7, Your Honor.

THE COURT: June 7. Well, all right, and you're suggesting three and a half and three and a half for Staples?

MS. BRANNON: Yes, Your Honor.

THE COURT: All right, anything else you want to tell me about the allocation on the Staples' deposition?

MS. BRANNON: No, Your Honor.

THE COURT: Okay.

MR. BADINI: May I be heard on that issue, Your Honor?

THE COURT: Sure.

MR. BADINI: Your Honor has already rejected this even allocation proposal at least twice, perhaps three times. The plaintiffs, the defendants, rather, are trying to have it both ways. I don't believe they've noticed a single third party deposition, they can correct me if I'm wrong, and the reason they haven't done that is they don't want to annoy their partners, and most of these third parties are their partners.

If Staples is really critical to them, they should have noticed it or cross-noticed it. In cases where we've had partners or former partners that have been important to our case, we've noticed them or cross-noticed them. And then they can take, and then we can take the appropriate time. I find it personally

offensive to hear Ms. Brannon say that that we have not cooperated with them. I recently sat across from her with a third party deposition who was an ex-Treehouse employee. They noticed him, we knew he was important to our case, so we cross-noticed him and we asked him to be there for two days. Ms. Brannon estimated she needed six hours of questioning, I estimated I needed five, so I figured that she would be done at the end of the first day and I would start the morning of the second day. In fact, Ms. Brannon went nine hours, I didn't start my cross examination until lunch the second day. Actually, not my cross examination, excuse me, my cross-noticed deposition. And even though I had estimated five hours, I took two and a half hours. And I didn't cut her off at seven, I didn't say you're done, because those aren't the rules governing this case.

So we've been cooperating and I think an arbitrary time limit is wrong. And if they really think someone is important, they should cross-notice the deposition or notice it in the first place.

MR. MOORE: Your Honor, I'd also like to be heard for JBR.

THE COURT: Go ahead.

MR. MOORE: Since we were the ones who noticed the Staples deposition. With respect to just the background as to the importance of this deposition and whether Staples is friendly to Keurig, I would note that Staples is a very important third party from the perspective of Rogers as well as I think for the other plaintiffs. Staples' relationship with Keurig dates back over ten years. They have been both a KAD for Keurig subject to an agreement that prevented them in certain sales channels from selling any unlicensed pods with respect to the office coffee services market. So they're important with respect to that.

They're also important because they are a big box retailer. They were presented with the Keurig 2.0 innovation rollout presentation back in 2014, and they have remained a Keurig, they have remained a seller of Keurig pods to this day. In 2017 the entered into an extremely unusual agreement in which they agreed to stop selling any unlicensed pods on the retail side, on the big box side. And so the deposition is intended to explore the extent to which Keurig pressured Staples to enter into this exclusive arrangement which happened while this litigation was pending in a brand new agreement in late 2017, which then caused staples to tell Rogers that it

would no longer carry Rogers' one cup pods, and I think any unlicensed pods.

So this is a very important deposition, it covers a very long timeframe, and a number of different agreements and a number of -- and multiple market segments. So when we noticed the deposition we noticed it for 5.5 hours for all five plaintiffs groups. We then worked with Keurig and agreed to lower our estimate to 4.5 hours for all five plaintiffs groups with Keurig getting 2.5 hours and we think that's fair because when we look at other depositions of third parties that have occurred to date, Keurig has typically taken an hour or two or three less than plaintiffs to question the witness. A default rule here would likely just result in a situation where plaintiffs, all five groups, get 3.5 hours, then Keurig decides to take an hour or two and then plaintiffs are cut off. And that's inappropriate here, particularly for Staples, given the long history.

We understand Staples is presenting the buyer who has been on the account for over ten years and has a very long timeframe of reference. And so the notion that Keurig isn't friendly with Staples when they

recently negotiated an exclusive arrangement that kicked out all the unlicensed pod makers, I think if Keurig wanted to get further testimony from Staples they certainly could. Thank you.

THE COURT: Okay. Does plaintiff want to offer anything, or defendant want to offer anything further on this, excuse me?

MS. BRANNON: Yes, Your Honor. We would propose that if we don't use, if Your Honor were to split the time three and a half, split it evenly by five and Keurig doesn't use the time, it would refer it back to plaintiffs if they need more time and were still within the seven hour deposition. I don't think the fact that Keurig has used less time in third party depositions is something to hold against us. I think it shows that we're trying to be very efficient and we're not wasting time. I mean plaintiffs have not argued that we're asking duplicative or inefficient questions. Mr. Badini did complain about me missing my estimate in the deposition of Mr. Lemieux (phonetic) but he didn't say any of the questions were duplicative or unnecessary. Plaintiffs have certainly gone over the time they've estimated at numerous Keurig depositions quite substantially. So, you know,

we're not planning to ask any questions that we don't think are important but Staples is referenced in the two competitor complaints and we need to defend ourselves against these claims.

THE COURT: Where is Staples being deposed?

MS. BRANNON: Sorry?

THE COURT: Where is Staples being --

MS. BRANNON: I believe in Boston.

THE COURT: Boston, okay. So if there's an application, in the absence of Staples' consent, an application to extend the deposition will be made in the district of Massachusetts?

MS. BRANNON: I believe it can be, well I believe we could come to you, Your Honor, or Staples could go to the Court in Massachusetts --

THE COURT: I mean was it issued as a Southern District Subpoena or District of Massachusetts subpoena or something else?

MR. MOORE: It was issued as a Southern District subpoena, Your Honor.

THE COURT: Okay. All right, I'm sorry, I interrupted you, go ahead.

MS. BRANNON: Thank you, Your Honor.

THE COURT: Again, I like to give both sides

an equal number of chances to be heard, do plaintiffs want to add anything?

MR. MOORE: Your Honor, I would add, yes, so Staples has been, although the subpoena was recently noticed, Staples has been on the list of potential deponents for several months so the raising of this issue at this late date strikes me as suspect when Keurig has obviously had plenty of time to ask its major retail partner how it wants to split the time allocation.

The counsel for Staples --

THE COURT: I suspect Staples doesn't want to split it at all, I suspect Staples doesn't want to be deposed.

MS. BRANNON: You're right, Your Honor.

MR. MOORE: Well, Your Honor, Staples is represented by Kirkland and Ellis and they did agree to sit for a full day deposition and have noted they'd be happy to start early if needed in the event that a little more than seven hours was needed.

THE COURT: Will Staples sit for eight.

MR. MOORE: I don't know if they've said they'll sit for eight. I don't think they've taken a position, but in any event, the issue to us appears to

be premature to hypothetically argue over how many hours are needed when plaintiffs have already indicated an intention to work with both Keurig and Staples to make use of the day.

THE COURT: How much time do you think you need with Staples, Ms. Brannon?

MS. BRANNON: I believe three and a half. And, Your Honor, I think your prior order instructed us to exchange time estimates as to nonparty depositions one week in advance of the deposition. I think we're exchanging our estimates and my understanding is that Kirkland and Ellis, and I haven't spoken with them directly, but my understanding is they've said they are not willing to sit past seven hours. I can be mistaken but I thought they had said they were willing to do a full day seven hour deposition and that was it.

THE COURT: Allocating time at a deposition is always a difficult thing to do, it's always going to be somewhat arbitrary and a lot goes into how a deposition goes forward. A lot depends on how quickly the interrogating attorneys ask the questions, how long the witnesses take to answer the questions, whether or not the witness' testimony is surprising

and opens an area that counsel hadn't known about before prompting further questions. A lot goes into the timing of the deposition here.

You think you need three and a half and how much time do the plaintiffs think they need, do you think you need four and a half?

MR. MOORE: That's correct, Your Honor.

THE COURT: Well, all right, I'm not sure there is any non-arbitrary way to really do this but I think what I'm going to do with Staples is set the presumptive limits at four and three, so both sides are losing half an hour of what they think they need. The presumptive limits are going to be four hours for plaintiff, three hours for the defendant.

Again, I would suggest that, you know, again, with the proviso that if there are areas that either side doesn't get to cover within their presumptive time limits they can make an application to extend the deposition. Again, you know, Kirkland and Ellis also has an abundance of talented attorneys and I'm sure they realize that the transaction cost of sitting for another hour is far less than the transaction cost of engaging in motion practice. So maybe if eight hours is the aggregate time that both sides need, maybe

there can be an accommodation on the part of Staples to have their witness sit for eight hours rather than engage in motion practice. All right, so the presumptive limits are four hours for plaintiff and three hours for the defendant on the Staples deposition.

Okay, anything else from plaintiff's side?

MR. MOORE: No, Your Honor.

THE COURT: Anything else from defendant's side?

MS. BRANNON: No, Your Honor, thank you.

THE COURT: Okay, thank you, all, have a good one.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, In re: Keurig Green Mountain Single-Serve Coffee Antitrust Litigation, Docket #14md2542, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: May 30, 2019